No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The most immediate result of respondents' lawsuit has been to delay, for more than a decade, the completion of an administrative process that Congress intended to be streamlined and expeditious. The deleterious effects of the court of appeals' rulings, however, are not confined to the protraction of the instant proceedings. The court's jurisdictional analysis will affect enforcement of the immigration laws more generally, flouting Congress's efforts in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, to ensure against this sort of judicial interference in the deportation process. The court has also recognized an unprecedented constitutional right to provide material support to foreign terrorist organizations. Those rulings threaten substantial disruption of important law enforcement and national security interests.

I. A. In our certiorari petition, we explain (at 13-20) that both before and after passage of IIRIRA, the courts below lacked jurisdiction to adjudicate respondents' selective enforcement claims prior to the entry of a final order of

deportation. The Ninth Circuit's finding of jurisdiction conflicts with the Third Circuit's holding in *Massieu* v. *Reno*, 91 F.3d 416 (1996), that the jurisdictional limitations imposed by the Immigration and Nationality Act are fully applicable to constitutional claims, specifically including selective enforcement claims. See Pet. 14-15.

Respondents contend (Br. in Opp. 12) that the jurisdictional issue does not warrant this Court's review because it "is governed by temporary 'transitional' rules that apply only to a small subset of immigration cases." That is not an accurate characterization of the *AADC III* court's holding. Nothing in the court of appeals' opinion suggests that its resolution of the jurisdictional question turned on the fact that the deportation proceedings at issue here were instituted before IIRIRA's effective date. To the contrary, the court assumed that *all* of the arguably relevant IIRIRA provisions—8 U.S.C. 1252(b)(9), (f), and (g) (Supp. II 1996)—applied to the present case. See Pet. App. 12a The Ninth Circuit's holding that respondents' selective enforcement claims could go forward therefore applies with full force to future deportation proceedings.[1]

B. As the petition explains (at 15-16), 8 U.S.C. 1252(g) (Supp. II 1996) applies to this case and requires that any challenge to a deportation proceeding must be brought in the court of appeals after entry of a final order. But even if Section 1252(g) did not preclude the instant suit, respondents have failed to identify any statutory provision that could plausibly be read to authorize it. In particular, the

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[1] 8 U.S.C. 1252(b)(9) (Supp. II 1996) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this [title] shall be available only in judicial review of a final order under this section.

It is difficult to conceive of statutory language that would more clearly foreclose the district court from adjudicating respondents' suit. Yet the court of appeals held that the suit could go forward even if Section 1252(b)(9) were assumed to apply to the instant case. Pet. App. 12a.

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*—the usual means of obtaining judicial review of an administrative agency's decisions—is inapplicable because the filing of charges is not reviewable "final agency action." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-245 (1980); Pet. 15 n.5.[2]

C. Respondents also invoke (Br. in Opp. 15) the principle that Congress will not readily be presumed to have foreclosed judicial review of constitutional claims. We do not contend, however, that respondents' claim of selective enforcement should escape judicial review altogether—only that the claim must be heard within the context of review of a final order of deportation. In the rare case where a selective enforcement claim requires resolution of disputed factual issues, the reviewing court of appeals may transfer the case to a district court pursuant to 28 U.S.C. 2347(b)(3). See Pet. 18.

Respondents contend (Br. in Opp. 17-18 & n.12) that transfer pursuant to Section 2347(b)(3) is impermissible because judicial review of final orders of deportation is confined to the administrative record. Their position is, in essence, that Section 2347(b)(3) should be narrowly construed so as to create a remedial gap, which can then be filled by an extra-statutory cause of action filed immediately in district court. None of the cases they cite, however, involved a constitutional challenge to a deportation order that rested on factual disputes that were not and could not have been resolved through the administrative process. To permit transfer to a district court in that

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[2] As the petition explains (at 17), the court of appeals erred in construing 8 U.S.C. 1252(f) (Supp. II 1996)—which is entitled "Limit on injunctive relief" and is by its terms a *restriction* on the reviewing court's remedial power—as an affirmative grant of authority to the district court. See Pet. App. 249a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). Respondents' reliance (Br. in Opp. 15 n.7) on 8 U.S.C. 1329 (1994) and 28 U.S.C. 1331 is also misplaced. Neither of those provisions creates a cause of action or authorizes adjudication of a suit against the government absent an independent waiver of sovereign immunity. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992).

narrow class of cases is far more consonant with the text of Section 2347(b)(3) and the overall statutory scheme than is the alternative proposed by respondents and adopted by the courts below.

D. Respondents also contend (Br. in Opp. 16) that judicial review after the entry of a final deportation order would provide inadequate relief because they will suffer "ongoing First Amendment injuries" during the pendency of the administrative proceedings. That argument is not logically confined to the deportation context; it suggests that statutory exhaustion and finality requirements must give way whenever a plaintiff's challenge to agency conduct includes a claim brought under the First Amendment. Respondents cite no case supporting that proposition.[3]

Respondents have failed, moreover, to explain the nature of their alleged "ongoing" injury. They offer no basis for believing that their continued association with the PFLP would likely affect the outcome of the administrative process. Moreover, respondents are now forbidden by

[3] Respondents rely (Br. in Opp. 15 n.9) on *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965). In *Younger* the Court relied on "equitable principles" in holding that the federal courts should generally abstain from entertaining collateral constitutional challenges to ongoing state proceedings. 401 U.S. at 54. Although the Court indicated that certain forms of bad-faith prosecution might warrant an exception to the general rule (*id.* at 48), it did not suggest that a mechanism for immediate judicial resolution of First Amendment claims is required by the Constitution. Indeed, the Court made clear that mere delay or uncertainty as to the proper resolution of First Amendment issues did not provide an adequate justification for federal intervention in ongoing state proceedings. *Id.* at 50-51. In *Freedman*, the Court held that a prompt judicial ruling was a prerequisite to any prior restraint on communicative activities. 380 U.S. at 58-59. Respondents, however, do not claim to have been the subjects of any prior restraint. The more apposite decision is *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), which held that criminal defendants could not appeal the district court's denial of their motion to dismiss an indictment. The Court explained that defendants' claim of prosecutorial vindictiveness could adequately be reviewed on appeal from a final judgment of conviction. *Id.* at 268-270.

an entirely separate statute from providing material support to the PFLP. See Pet. 20 n.7, 23-24; pp. 7-8, *infra*. The pending deportation proceedings therefore cannot impermissibly "chill" respondents from engaging in the sort of fundraising activities for the PFLP that led the FBI to refer their cases to the INS in the first place.[4]

II. A. The thrust of the court of appeals' constitutional analysis is that the First Amendment precludes federal officials from "targeting" respondents because of their PFLP fundraising unless respondents are shown to have acted with "specific intent to pursue illegal group goals." Pet. App. 20a. Respondents assert (see Br. in Opp. 4, 10, 11, 19) that the propriety of that holding is not properly presented in this case. They contend that whatever the constitutional status of their PFLP fundraising, their participation in protected expressive activities other than fundraising was found by the district court, and conceded by the government, to be a separate and independent basis for the decision to bring deportation charges. See, *e.g.*, *id.* at 4. That contention is not supported by the record.[5]

[4] Respondents contend (Br. in Opp. 10) that the petition is "premature" because this case (more than ten years after its inception) remains in an interlocutory posture. That contention ignores that a crucial error in the court of appeals' analysis was its decision to allow the suit to proceed in the first instance. As this case amply demonstrates, premature judicial involvement can substantially disrupt the deportation process whatever the ultimate disposition of the suit. Deferral of review until proceedings in the lower courts are complete would exacerbate that harm, yet would be unlikely to clarify the issues presented or to provide the Court with an increased understanding of the significance of the court of appeals' rulings.

[5] Respondents' treatment of the record in this case is exemplified by their partial quotation of an FBI report offered into evidence in the district court. That report states:

> Large sums of money are being collected by the PFLP in the United States to fund its violence and terror machine. This document hopes *to identify key PFLP people in Southern California sufficiently enough so that law enforcement agencies capable of disrupting the PFLP's activities through legal action can do so.*

In the footnote on which respondents principally rely, the district court stated that at the time the charges were filed, the government "believed * * * that it could deport [respondents] merely for associating with the PFLP." Pet. App. 75a n.14. That statement does not purport to be a "finding" as to the actual motivation of government officials, much less a finding whose accuracy the government has conceded. As we explained in the court of appeals,

> regardless of what the responsible Government officials believed *could* as a matter of law be sufficient grounds for [respondents'] deportation, we submitted evidence showing that the FBI discovered what it understood to be substantial fundraising activity by [respondents] on behalf of the PFLP for money to be sent overseas, that it reported this evidence to the INS, and the INS district counsel then drafted deportation charges based on that evidence. Furthermore, the Government has made quite clear to the district court that, if it is ever allowed to proceed with the administrative deportation proceedings, we will show that both Hamide and Shehadeh were engaged in fundraising for the PFLP.
>
> The district court has made no factual finding in the face of this evidence that [respondents'] fundraising activities were not the reason that deportation charges were prepared and filed. Thus, [respondents'] contention that the district court has made some cardinal factual findings that we do not dispute and that undermine our legal arguments is wrong.

Gov't C.A. Reply Br. 13-14 (footnote omitted).

All of the associational activities to which respondents allude, moreover, are part of a single course of conduct. This is not a case in which "legitimate" and "illegitimate"

C.A. Supp. E.R. 354 (emphasis added). Respondents quote only the underscored language (see Br. in Opp. 4), omitting the reference to PFLP fundraising efforts—a reference that is obviously crucial in determining the purpose of the investigation here.

bases for governmental action are separate and distinct. It is farfetched to suppose that immigration officials would have declined to initiate deportation proceedings if they had limited their inquiry to fundraising—some of the most harmful and clearly unprotected aspects of respondents' PFLP-related activities.[6]

B. As the petition explains (Pet. 23-25), the *AADC III* court's First Amendment analysis casts significant doubt upon the constitutionality of a federal criminal statute (now codified at 18 U.S.C. 2339B (Supp. II 1996)) and an Executive Order (No. 12,947, 60 Fed. Reg. 5079 (1995)), which forbid the provision of material support to designated foreign terrorist organizations, including the

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[6] Respondents also suggest (see Br. in Opp. 6 n.4, 20 & n.15) that the record evidence fails to establish their participation in PFLP fundraising activities. The *actual* nature and extent of respondents' fundraising, however, is irrelevant to the proper resolution of their selective enforcement claims. At least so long as the government acted in the reasonable belief that respondents had raised money for the PFLP, respondents could not establish impermissible selective enforcement simply by demonstrating that the government's belief was wrong. See *Cameron* v. *Johnson*, 390 U.S. 611, 621 (1968) (plaintiff could not establish bad-faith prosecution warranting injunctive relief simply by showing that the evidence would not support a conviction on the criminal charge); cf. *Waters* v. *Churchill*, 511 U.S. 661, 677-678 (1994) (plurality opinion); *id.* at 686-694 (Scalia, J., concurring in the judgment). The government's assessment of respondents' fundraising activities was plainly reasonable, given the terrorist record of the PFLP, other investigative information obtained about PFLP fundraising in the United States, and the militaristic nature of the specific fundraising events in which respondents engaged. See Pet. App. 60a-62a, 68a.

Respondents err in asserting (Br. in Opp. 6 n.4) that the evidence showed that all funds raised were designated for a tax-exempt humanitarian aid organization. The district court's opinion, at the very page respondents cite (Pet. App. 63a), demonstrates otherwise. See also C.A. E.R. 46 (Knight Decl. ¶ 138). The actual nature and extent of Hamide and Shehadeh's PFLP-related activities will of course be crucial to the ultimate disposition of the deportation charges against them. The courts have no authority, however, to resolve those issues in advance of the administrative proceedings under the rubric of adjudicating a selective enforcement claim.

PFLP.[7] The court of appeals' decision threatens to undermine enforcement of those prohibitions, both by reducing their deterrent value and by diminishing the likelihood that violators can be successfully prosecuted.[8]

C. As respondents observe (see Br. in Opp. 22-23 & n.16), this Court has held in various contexts that restrictions on the solicitation and donation of funds for a domestic organization raise First Amendment concerns. None of those decisions, however, casts doubt upon the authority of the political Branches to bar the provision of material support to *foreign* organizations whose violent activities are deemed inimical to United States national security and foreign policy interests.[9] With respect to that question, the more relevant precedent is *Regan* v. *Wald*, 468 U.S. 222 (1984), which upheld a Treasury Department regulation prohibiting any transaction involving property belonging to Cuba or any Cuban national. See Pet. 22-23.

Respondents contend (Br. in Opp. 25 n.19) that a ban on financial transactions with foreign countries is constitutionally distinguishable from a comparable ban on transactions with foreign political organizations. The same foreign policy and national security concerns that justify sanctions against foreign governments, however, apply with equal (or greater) force to foreign terrorist organizations whose violent actions threaten American interests. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a), 110 Stat. 1247 (congressional findings regarding the threat posed by foreign terrorist organizations); Pet. 23-25 & nn. 11-12.[10] The

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[7] Because the fundraising activities at issue in this case predated the enactment of Section 2339B and the signing of the Executive Order, respondents would not be subject to criminal prosecution based on those activities. The fact that respondents' fundraising violated no federal criminal law, however, does not mean that it was constitutionally protected conduct. There is consequently no basis for respondents' reliance on the testimony of then-FBI Director William Webster that "if these individuals had been United States citizens, there would not have been a basis for their arrest." C.A. Supp. E.R. 93; see Br. in Opp. 2. Director Webster's statement appears simply to have been an acknowledgment that no then-existing criminal statute forbade respondents' PFLP-related activities, not a concession that the Constitution would preclude the imposition of criminal sanctions for this type of conduct.

[8] Section 2339B is currently the subject of a First Amendment challenge filed in the United States District Court for the Central District of California. See *Humanitarian Law Project, et al.* v. *Reno, et al.*, No. 98-1971 ABC (BQRx) (*HLP*). Plaintiffs in *HLP*—represented by counsel of record for respondents in the instant case—contend that a preliminary injunction against enforcement of Section 2339B "is required by" the Ninth Circuit's decision in *AADC III*. See Reply Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction 1 (filed May 11, 1998). They argue that "[t]he law in the Ninth Circuit is clear: the First Amendment bars the government from penalizing individuals for providing material support to a foreign organization unless the government shows that the individuals had 'the specific intent to pursue illegal group goals.'" *Id.* at 2.

[9] Respondents suggest (Br. in Opp. 24) that a ban on material support to the PFLP amounts to prohibited "viewpoint-based discrimination." As the D.C. Circuit has recognized, "[t]o hold that the government cannot make viewpoint-based choices in foreign aid and foreign affairs would not only depart from settled precedent, but would work much mischief." *DKT Memorial Fund* v. *Agency for Int'l Dev.*, 887 F.2d 275, 290 (1989). The development of U.S. foreign policy inevitably requires that distinctions be drawn between overseas entities (both governmental and non-governmental) that are friendly to U.S. interests and those that are hostile. Material support to the PFLP is forbidden, moreover, not because the money may be used to fund the expression of unpopular opinions, but because of the tangible consequences of the PFLP's violent conduct.

There is similarly no basis for the contention (Br. in Opp. 24) that the ban on material support constitutes impermissible "guilt by association." This Court has held that the government may not impose punishment based on "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government." *Healy* v. *James*, 408 U.S. 169, 186 (1972). Because funds provided to the PFLP may be used for violent purposes irrespective of the donor's intent, see Pet. 25 n.12, provision of funds without more "poses the threat feared by the government." That is true even where the provision of money is prompted by a non-ideological motive, as when funds are provided in the context of a commercial transaction.

[10] Unlike even rogue states, terrorist organizations do not submit to international legal principles or institutions, United Nations jurisdiction, or treaty obligations.

apparent consequence of respondents' position is that U.S. residents may be prohibited from providing funds to foreign governments that support the PFLP, but may not be barred (absent specific intent to further unlawful activity) from providing funds to the PFLP itself. Nothing in this Court's decisions supports that incongruous result.

D. Respondents maintain (Br. in Opp. 25-27) that the First Amendment principles governing the United States government's relationship with its citizens can be applied in their entirety to the context of deportation. This Court has long recognized, however, that decisions regarding an alien's right to enter and remain in this country are largely entrusted to the political Branches. See Pet. 27-29. Those decisions may permissibly be based on associational activities that would be protected by the First Amendment if engaged in by a citizen. This Court's precedents make clear that an alien may be deported on the basis of meaningful membership in an organization that advocates violence, even if the alien does not personally espouse or know of that tenet of the organization. See *Galven* v. *Press*, 347 U.S. 522, 530 (1954); *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, 472 n.2 (1963); Pet. 28-29. The Ninth Circuit's holding that respondents may not be subjected to deportation because of fundraising on behalf of the PFLP without a showing that they specifically intended to further the PFLP's violent activities cannot be squared with those precedents.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MAY 1998